

THE NEW WAR: WHAT RULES APPLY?

Identifying Limits on a Borderless Map

Richard Falk

Two requirements have governed my thinking about an appropriate response to the attacks of September 11: the urgent need for action that would greatly reduce the threat of future mega-terrorist incidents, and the necessity of recognizing the appropriate legal, moral, and political limits to waging a defensive war.

THE NEED FOR ACTION

In this essay, the need for action is taken for granted, given the gravity of the harm inflicted in the form of an armed attack, the persistence of the threat posed by the proclaimed intentions and apocalyptic leadership of Osama bin Laden, the demonstrated capability of al-Qaeda to carry out such missions, the dramatic failures of prior reliance on law enforcement techniques to apprehend and punish the perpetrators of major terrorist acts, and the inadequacy of intelligence warnings and preventive actions to provide societal protection. In essence, it would have been impossible for the government of the United States to retain its legitimacy if it had not responded as effectively as possible to the September 11 attacks. Indeed, to retain credibility, sovereign states must demonstrate their capacity to provide security by acting decisively in emergencies to mobilize the relevant resources at their disposal. The difficult challenge was to translate this imperative for action on behalf of security into effective policy directives, given the unprecedented nature of this enemy. It was not a state, but rather a “network” with operational nodes in sixty or more countries, including quite possibly the United States; nor was it formally or openly associated with any particular state or geographical area.

The decision by the Bush administration to launch a war against Afghanistan as the first phase of an effective response was generally convincing. There seemed to be strong evidence of the presence of bin Laden and the al-Qaeda headquarters in Afghanistan, a presence made possible by the Taliban regime. This regime was the embodiment of the most severe variant of Islam ever translated into a govern-

ing process, and this oppressive model of Islamic life evidently represented the visionary goal of the al-Qaeda terrorist activity for the entire Muslim world. The Taliban leadership was symbiotically linked to al-Qaeda and its leadership. Osama bin Laden has been quoted on several occasions as expressing his admiration for Taliban-style rule as correctly embodying and prefiguring a desired Islamic political order. There have also been several journalistic assessments, including by Ahmed Rashid, of the degree to which Mullah Mohammed Omar has accepted the visionary orientation toward the United States articulated by Osama bin Laden.¹

As of late December 2001, the Afghanistan war had met its major early-stated objectives, seemingly reducing significantly al-Qaeda's capabilities to engage in global terrorism and seriously tarnishing its image as a credible opponent of the United States in the context of a military and civilizational encounter. Although the U.S. government did not rely on a humanitarian intervention rationale, a beneficial side effect of its military operations has been to emancipate the peoples of Afghanistan from cruel and brutal rule, with improved opportunities of rescue from the immediate threat of mass starvation and the deeper conditions of extreme poverty, worsened by twenty-five years of war.

The victory in Afghanistan has by no means extinguished the September 11 threat, but it has decisively weakened al-Qaeda's capacity for mega-terrorist activities originating in Afghanistan. Al-Qaeda's presence was so manifest in Afghanistan that it seemed highly reasonable to hold this particular sovereign state sufficiently culpable to vindicate recourse to war against it: a war that aimed not only to destroy the al-Qaeda presence and to capture or kill Osama bin Laden, but also to destroy Taliban rule. A further goal of the war was to replace the Taliban with a government that would not allow its territory to be used as a base for global terrorism and would be more likely to respect basic human rights.

This fundamental encroachment on the sovereign rights of Afghanistan took place without a specific mandate from the United Nations Security Council, and without much evident consideration by the U.S. government of prohibition by international law on recourse to war. Moreover, there has been no attempt as yet to provide evidence that the Taliban regime was specifically linked to the September 11 attacks, or even possessed advance knowledge of the mission; thus the legal responsibility of Afghanistan is at best indirect, consisting of its having harbored terrorists known to be preparing and training for such missions. The undertaking of war under these circumstances needs to be treated as an excep-

¹ Ahmed Rashid, *Taliban: Militant Islam, Oil, and Fundamentalism in Central Asia* (New Haven: Yale University Press, 2000).

tional case that does not set a precedent. Unfortunately, in entirely different circumstances of unresolved struggles involving self-determination of peoples, states such as India (Kashmir) and Israel (Palestine) have invoked the U.S. response as validating their own escalation of violence against alleged sources of terrorism, and the United States has acquiesced, or in the case of Israel, provided explicit support. Additionally, Russia and China have been able to intensify their repressive violence against Chechnya's independence movement and Uighur separatists of Xinjiang Province, respectively, without encountering a hint of criticism from Washington. U.S. diplomacy has done little to restrict the response to terrorism to the specific circumstances surrounding September 11.

What the Bush administration needs to stress above all is that it is not beneficial to generalize the justifications for waging war against the Taliban or to minimize the potential costs to world order and international law of a failure to abide by the prohibition on the use of force against a sovereign state. The normative framework of the UN Charter should be reaffirmed: "Self-defense" against terrorism should be narrowly understood, and the procedural obligation to validate uses of force by seeking approval from the Security Council should not be abandoned for the sake of geopolitical expediency. This concern is also relevant to post-Afghanistan phases of the response to September 11, where I do not believe the case can be reasonably made that normal inhibitions on the use of force and respect for territorial sovereignty should be suspended.

Shifting the focus from effectiveness to limits of response brings one immediately up against the unprecedented nature of the threat, and the degree to which its removal challenges the moral, legal, and political imagination. The first difficulty is associated with the interplay between the right of self-defense and the non-territorial extension of al-Qaeda. As already discussed, it is important to interpret the right of self-defense narrowly in general accordance with the spirit if not the letter of the UN Charter, which in Article 51 restricts self-defense to situations where a state has been the victim of an armed attack. It is desirable to adopt a sufficiently flexible approach to self-defense that allows a state victimized by mega-terrorism in the manner of September 11 to respond in an effective manner even if this means acting outside the letter of international law. Such a basis for response existed in this instance by credible inference and evidence that the target of military action had a close and indispensable connection to both the harm inflicted and the continuation of the capability and threat to inflict future harm.

The second difficulty is to apply limits in the setting of "war" between a non-state, transnational network and the leading state, whose geopolitical presence is global. This conceptual complication is novel, and also raises questions about the

practical and persuasive relevance of international law and the Charter of the United Nations, both of which have articulated norms almost exclusively on the assumption that rules governing the use of force are based on conflicts between adversary sovereign states; even in the UN setting, the claim of control is further acutely constrained vis-à-vis a superpower (as acknowledged by the veto). What is needed to endow international law and UN authority with renewed authority is to strike a reasonable and flexible balance between inhibitions on recourse to force and defensive rights, taking into account such new developments as the emergence of global terrorism and the rise of international human rights.

The third difficulty is associated with the wide resonance of the grievances associated with Osama bin Laden's campaign in the Islamic world. To avoid aggravating the threat it is important not to inflame anti-American sentiment further by military overreaction and diplomatic missteps. It is also important to address grievances against the United States, especially those associated with Palestinian self-determination and Iraqi sanctions. A problematic aspect of this challenge is to correct past injustices without seeming to reward terrorism. To be effective in the long run, a response must address the root causes of terrorism. Emphasizing root causes reformulates the conventional way of thinking about effectiveness, but it also offers a pragmatic rationale for imposing strict limits on the response.

HAVE LIMITS BEEN RESPECTED?

The most useful source of limits is derived from the doctrine of just war, based on the intertwined traditions of religion, morality, and law. The essence of just war thinking is a conditioning of war upon just causes, just means, and just goals. As argued, the September 11 attacks provide ample grounds for establishing a just cause, although the nature of the cause is such that military means of response should be kept subordinate to the extent possible. The nature of just means is determined most authoritatively by reference to the laws of war and international humanitarian law, with especial attention to the duty of belligerent parties to respect civilian innocence.

President Bush in his November 10, 2001, address to the United Nations General Assembly asserted: "Unlike the enemy, we seek to minimize, not maximize, the loss of innocent life." Some of the tactics relied upon in Afghanistan raised doubts about the good faith of this claim. The reliance on B-52 bombing, "daisy cutters," and cluster bombs resulted in a large number of Afghan civilian casualties in a context in which the U.S. combat casualties (as distinct from friendly fire and accidents) were zero during this phase of the war, surely raising questions

about the way in which the war was fought and the degree of conformity with the laws of war and just means. It should be pointed out, however, that improvements in targeting and guidance technology have made weaponry of the sort used in Afghanistan significantly more accurate than in past wars, and capable of generally limiting direct applications of force to what were believed to be military targets.

Disputes arose as to whether those who planned certain attacks were mistaken about the military character of targets, and thus directed military power against civilians. What is clear, and establishes a crucial moral and legal distance between the terrorism of September 11 and the Afghanistan war, is that civilian casualties were not the result of deliberate actions. That said, more could and should have been done to avoid civilian casualties, even if this meant taking somewhat greater risks of enduring American casualties. The occurrence of civilian casualties, however, is not evidence of departure from the norms of just war. The main objective of just war thinking is to encourage practical morality and to establish strict prohibitions on the deliberate killing of those who are not participating as combatants. At the same time, by allowing the opposing sides to invoke “military necessity” to validate acts that produce civilian harm, there is an acknowledgment that just war may result in extensive civilian death and devastation.

There are two grounds for concern. First, European media devoted far more attention to Afghan civilian casualties than did their American counterparts. As a result, many were left with the impression that the avoidance of such casualties was not an official priority, especially when compared with the huge attention given to Americans who died or were wounded in the combat theater even as a result of accidents. Second, there seemed to be little effort by the United States to use its influence to ensure that its Afghan allies on the ground acted in accordance with international law. The U.S. role in failing to restrain Northern Alliance forces from massacring Taliban prisoners of war, especially in the course of controlling the makeshift prison at Mazar-e-Sharif, has been convincingly criticized by respected European journalistic observers.²

A BROADER MANDATE?

Where the just war framework seems most relevant is with respect to the pursuit of just goals and the extent to which these goals are validated by their genuine

² See, for example, Adam Roberts, “Crisis at Kunduz: The Coalition Must Make It Clear That Surrendering Troops Will Be Treated Humanely,” *The Guardian*, November 24, 2001; Editorial Board, World Socialist Web site, “U.S. War Crime in Afghanistan: Hundreds of Prisoners of War Slaughtered at Mazar-i-Sharif,” November 27, 2001; also “America’s ‘Killing Hour,’” *Wall Street Journal*, November 21, 2001.

linkage to the just cause associated with an effective response to the al-Qaeda threat. In this context, the ongoing debate within the U.S. government and American think tanks about the military extension of the war to Iraq illustrates the problem. To wage war against Iraq would widen the agenda beyond the al-Qaeda threats to encompass countries that are viewed as hostile to the United States. To the extent that a genuine Iraqi threat exists it is not associated with terrorism directed at the United States, but rather with Iraq's posing a regional threat through the acquisition of weaponry of mass destruction and the commission of crimes against humanity in Iraq itself. An extension of the war to Iraq would arouse domestic criticism in the United States, break the impressive degree of international unity supporting the U.S. response to al-Qaeda, and awaken suspicions in the Islamic world that an intercivilizational war was under way despite the reassurances of American leaders to the contrary.

The most plausible interpretation of just goals would limit post-Afghanistan operations to the nonmilitary domains of intelligence operations, cooperative law enforcement, diplomatic leverage, and financial interdiction. In these undertakings the efforts would be directed toward both the identification and destruction of al-Qaeda cells, allowing for some blurred boundaries between al-Qaeda and other political organizations that share al-Qaeda's goals and methods. Such efforts would contribute to the counterterrorist objective of restoring American security and weakening terrorist operations of "global reach."

For this reason, a second limitation of great importance would be to refrain from efforts to destroy political movements that engage in armed struggles associated with limited, national ends. One thinks first of Hamas and Hezbollah. Hamas, in particular, has openly avowed suicidal attacks on Israeli civilian targets, and has caused great loss of life by adopting horrifying tactics, as well as generated acute anxiety about future attacks. But here the context is one in which Israel has also directed its military power in such a way as to wage war against civilian Palestinian society in a manner that relies on modes of violence that are flagrant violations of international humanitarian law and are best conceived of as a species of terrorism undertaken by a state. Hezbollah's main violence was directed at the Israeli army of occupation in southern Lebanon, and does not even qualify as terrorism by most accepted definitions. To suppress Hamas and Hezbollah in the setting of the unresolved Israel-Palestine dispute is to frustrate still further the Palestinian struggle to achieve self-determination, and it would certainly feed the anti-American resentment that already abounds in the Arab world. As a result, it might actually increase the threats of future anti-American terrorism. At this point, although the U.S. government is keenly aware of the nonmilitary aspects of

responding effectively to September 11, it has focused almost all public attention on its military response. Such a focus has made sense in relation to Afghanistan, but it will not subsequently. The U.S. government has emphasized effectiveness, but not limits, and it has encouraged a surge of patriotism that is resistant to self-criticism. As a result, there is a tendency to downplay the risks of a military over-reaction, and to neglect the challenge of the deeper roots of terrorism. Influential pundit-scholars, most notably Bernard Lewis, have argued that weak resolve by the United States in the past has encouraged terrorists to take bolder action, and that the best mode of response is one that exhibits a maximal resolve.³ But this kind of approach mirrors Osama bin Laden's outlook and could plunge the world into an intercivilizational struggle. We can and must act to avoid this outcome.

³ See Bernard Lewis, "The Revolt of Islam," *The New Yorker*, November 19, 2001, pp. 50-63, especially pp. 60-63; also Lewis, "Did You Say 'American Imperialism?'" *National Review*, October 17, 2001, pp. 26-30.